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WE are pleased to see our view of Hancock v. Yaden, as to the validity of the Indiana act regulating the payment of employees by corporations, indorsed by the *Albany Law Journal* whose opinions of the law are, in point of value, second only to its poetic accomplishments. As a matter of fact we gave expression to our views on the subject of that case, without much authority or precedent at hand. We intuitively felt that the decision was erroneous, and the more we have studied and investigated the question, the stronger is our conviction. Our attention has lately been called to the case of Shaffer v. Union Mining Co., 55 Md. 74. That was a case where it was clearly within the scope of the legislative power to enact the measure prohibiting the corporation from paying its employees otherwise than in money, because the corporation in question was a body of its own creation, and the right to amend and alter its charter was expressly reserved. Hence, the court was justified in holding that, so far as the corporation was concerned, it was bound by the restrictive law. And yet even there it is very properly held that the restriction was in the interest of the employee, and that being protective in character it cannot have been intended as restrictive of the employee's right. In other words, the prohibition does not extend to the employee who may accept payment of his wages in anything he chooses, and the court expressly says that a restriction of that character upon employees would be an unconstutional innovation of their rights, which is the position we took. This is in harmony with the view of Cooley in his work on Const. Limitations, p. 492. To give any other construction to the law would be doing unwarranted violence to the right of employees over the fruits of their own labor. It is the corporation which is punished and not the employee.

WE are reminded of a remissness in failing to note the unfortunate death of Judge James V. Campbell, of Michigan, by the receipt of the eulogy upon his life and character, delivered by Hon. W. H. H. Russell on the occasion of the presentation of the resolutions of the bar in the United States Circuit Court at Detroit. The remarks of Mr. Russell were interesting, especially in the account of the life of that eminent man, who, at the age of thirty-five years, by sheer force of his learning and ability, because a judge of the supreme court. As one of the faculty of the law department of Michigan University for twenty-five years he gave it reputation by his great ability and wisdom, though only the eulogist may be justified in saying as Mr. Russel said that, "with that far-famed and eminent constitutional jurist and author, Thomas M. Cooley, and the Hon. Chas. J. Walker, he lead the ablest triumvirate of legal tutors this country has ever produced." Judge Campbell was undoubtedly a man of remarkable force of character and great depth of learning, coupled with an exalted conception of justice and law. His death was a great loss to the institution which he served so faithfully and to the profession which he adorned.

AN important stage in the old controversy between the State of Virginia and the holders of its bonds was reached recently when the Supreme Court of the United States decided a number of cases involving one phase or another of the litigation. The outcome of the conflict between the State and the bondholders has been adverse to the main contentions of the State. Step by step the court has, in particular cases, elaborated the general doctrine that the act of 1871 constituted a contract between the State and the bondholders, the obligation of which could not be impaired by subsequent action on the part of the State. The conclusions reached by the court were in substance well stated by *Bradstreets* in a recent article, viz.:

(1) The act of 1871 constituted a contract between the State and the holders of bonds and coupons issued thereunder, the obligation of which the State could not impair by subsequent legislation. (2) The various State statutes passed for the purpose of restraining

the use of the coupons for the payment of taxes and other dues to the State, and imposing impediments and obstructions to that use and to proceedings instituted for the purpose of establishing the genuineness of the bonds, did in many respects meterially impair the obligation of the contract so constituted and could not be held valid. (3) Any lawful holder of tax-receivable coupons who tendered such coupons in payment of taxes or debts due the State and continued to hold himself ready to tender them was entitled to be free from molestation on account of such taxes or debts, and might vindicate such rights in all lawful modes of redress by suits to recover property or to recover damages for property taken, by injunction where the taking of the property would be attended with irremediable injury or by defense to any suit brought against him. On the other hand, the court held that no proceedings could be instituted by holders of State bonds or coupons against the commonwealth directly or indirectly by suits against its executive officers to control them in the exercise of their official functions as agents of the State.

"ORIGINAL package" legislation has not yet reached the period of consummation. The latest step taken in relation to it is the substitution by the judiciary committee of the house of a measure of its own instead of the senate bill. Both bills will be found in full in the article of Mr. Francis Minor on page 50 of this issue. Though the house measure is, in some respects, more satisfactory than that proposed by the senate, they are both, in our opinion, and in the opinion of many better qualified to advance one, susceptible to the plea of unconstitutionality, for reasons stated in a late issue of this JOURNAL, and in the paper of Mr. Minor. Among other things it will be noticed that while the senate bill was confined in its terms to the single subject of liquors, the house measure is made to apply to all commodities without exception. The provision against discrimination is also an improvement.

NOTES OF RECENT DECISIONS.

FEDERAL COURTS—JURISDICTION—CUSTODY OF INFANT—HABEAS CORPUS.—The Supreme Court of the United States, in *Ex parte* Burrus, 10 S. C. Rep. 850, holds that there is no jurisdiction in the federal courts to determine a question as to the right of a father to have the custody of his infant child, as against the grandfather, who detains it, such questions belonging exclusively to the polity of the several States. The district courts have no jurisdiction of causes by reason of the diverse citizenship of the parties; and one who was imprisoned by authority of a district court for violating an order therein made awarding the custody of an infant child as between persons of diverse citizenship, was illegally imprisoned, and will be released by a writ of *habeas corpus*. Mr. Justice Brewer dissented. The court says:

So far as the question whether the custody of a child can be brought into litigation in a circuit court of the United States, even where the citizenship of the opposing parties is such as ordinarily confers jurisdiction on that court, the matter was left undecided in the case of Barry v. Mercein. Obviously, although the statutes of the United States have since enlarged the jurisdiction of the circuit courts by declaring that they shall have original cognizance, concurrent with the courts of the several States, of all civil suits arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, the difficulty is not removed by this provision; for, as we have already said, the custody and guardianship by the parent of his child does not arise under the constitution, laws, or treaties of the United States, and is not dependent on them. But whether the diverse citizenship of parties contesting this right to the custody of the child could, in the courts of the United States, give jurisdiction to those courts to determine that question, has never been decided by this court, that we are aware of. Nor is it necessary to decide it in this case, for the order for a violation of which the petitioner is imprisoned for contempt is not a judgment of the circuit court of the United States, but a judgment of the district court of the same district. There is apparently a studied effort in the record before us to treat the proceeding as one in the district court of the United States for the district of Nebraska, and also as one before the judge of that court; but we apprehend that it must be considered for what it is worth, as the judgment of the district court, both the order for the delivery of the child to its father and the order for the imprisonment of the present petitioner for contempt being made in that court. The jurisdiction of that court is not founded upon citizenship of the parties; and though the original petition of Miller, the father of the child, was amended after the judgment was rendered, so as to show that he was a citizen of the State of Ohio, and the defendants, Burrus and wife, were citizens of Nebraska, it is not perceived how that averment aids the parties in the present case, for the district courts

of the United States have not jurisdiction by reason of the citizenship of the parties. If, therefore, there was no other ground of jurisdiction of that court in the *habeas corpus* case, by which the child was delivered to its father, it was entirely without jurisdiction.

We have already said that the relations of the father and child are not matters governed by the laws of the United States, and that the writ of *habeas corpus* is not to be used by the judges or justices of courts of the United States, except in cases where it is appropriate to their jurisdiction. Of course, this does not mean that they have jurisdiction in all cases to issue the writ of *habeas corpus*, but that they have such jurisdiction when, by reason of some other matter or thing in the case, the court has jurisdiction which it can enforce by means of this writ. Whatever, therefore, may be held to be the powers of the circuit courts in cases of this kind, where necessary citizenship exists between the contestants, which gives the court jurisdiction of all matters between such parties, both in law and equity, where the matter exceeds $2,000 in value, we know of no statute, no provision of law, no authority intended to be conferred upon the district court of the United States to take cognizance of a case of this kind, either on the ground of citizenship, or on any other ground found in this case.

MARRIAGE—BETWEEN WHITE PERSON AND NEGRO— CONFLICT OF LAWS— CONSTITUTIONAL LAW.—The question of mixed marriages has again come before the courts, and this time it was the construction of the statutes of Georgia by United States Circuit Court, Judge Speer, in State v. Tutty, 41 Fed. Rep. 753. It appears that Tutty, a white man, and Ward, a negro woman, were indicted in the State courts for fornication, and thereafter repaired to the District of Columbia, and were married, immediately returning to Georgia, and thereupon attempted to remove into the United States court the indictments pending against them. The petition for removal was denied, and the indictments remanded to the court of the State, the court holding that:

By the settled policy of the State of Georgia, marriage relations between white persons and persons of African descent are forever prohibited, and by the statutes of the State such marriages are declared null and void. These statutes have been held to be in accordance with the constitution by the supreme appellate tribunal of the State. The statutes of the State also declare that all marriages solemnized in another State by parties intending at the time to reside in Georgia shall have the same legal effect as if solemnized in the latter State; and, further, that parties residing in Georgia cannot evade the provisions of its laws as to marriage by going into another State for the solemnization of the marriage ceremony. The contract of marriage is not a "contract," within the meaning of the provision in the constitution of the United States prohibiting States from imparing the obligation of a contract Marriage is more than a contract; it is an institution which is the foundation of the family and of society. The rights and qualifications of the parties thereto depend upon the legislation of the State, as controlled for the benefit of the entire community, by principles of public policy. Where the statutory law is silent as to the effect of marriages between persons domiciled in a State, and who leave it with the purpose to solemnize the marriage elsewhere, to evade such laws, but intending to return and live therein, the marriage may be upheld where the inhibition relates to form, ceremony, or qualifications depending on age or like condition. When, however, the marriage is inhibited by a positive policy of the State, as affecting the morals and good order of society, and leading to serious social evils, the marriage will be held void. Where the State has enacted legislation declaratory of the effect of marriages, extraterritorially, of its citizens, who by such marriages seek to evade its positive policy and penal laws, the declaratory statute affords the rule of decision.

MASTER AND SERVANT — LIABILITY FOR SERVANT'S TORTS.—IN McClung v. Dearborne, 19 Atl. Rep. 698, the Supreme Court of Pennsylvania says that one who sends his servant to take personal property from the possession of another, who claims to own it, is responsible in damages for an assault and battery committed by the servant in gaining possession of the property, though he had instructed his servant not to assault any one, and not to break the law. Williams, J., says:

Dearborne is a dealer in cabinet organs and other musical instruments. It is his habit, and it seems to prevail quite generally among dealers in similar articles, to sell on the installment plan to those who desire it, taking an instrument in the nature of a lease from the purchaser. The several installments of purchase money are to be paid as rent. If they are paid, the article becomes the property of the so-called "lessee." If not paid, the vendor reserves the right to seize and retain the article.

Fox was an employee of Dearborne, whose business was to hunt up instruments on which one or more installments were unpaid, whether in the hands of the original purchasers or their vendees, in order that they might be seized or replevied by Dearborne. He had sought and obtained admission to the house of McClung by means of falsehood, and secured the number and description of the cabinet organ in the parlor. His employer alleged that it was an instrument which he had sold or leased to a customer two or three years before, and on which unpaid installments were due. Fox expressed confideuce in his ability to invade McClung's home a second time and bring off the organ, without a breach of the peace. An expedition was fitted out, consisiting of two men and a team, under the direction and control of Fox, for this purpose. Before they set out, they were instructed by Dearborne not to commit an assault and battery on any person, and not to break the law. They went to McClung's house, secured admission to the parlor by a false pretense, and began the removal of the organ. Mrs. McClung and her son, who happened to be at home, tried to resist, but were at once overpowered, and the organ and its belongings carried off.

On the trial the learned judge of the court belo

told the jury that the conduct of Fox "was without mitigation, and deserving of the severest condemnation," but that whether Dearborne was responsible for it or not depended on the instructions he gave him when he started out on the expedition. The correctness of this instruction is the point on which this appeal depends. The general doctrine laid down by the learned judge, that every man is liable for his own trespass only, must not be taken too literally; for one must be held to do that which he procures or directs another to do for him, as well as that which he does in his own person. *Qui facit per alium facit per se.* Servants and employees are often without the means to respond in damages for the injuries they may inflict on others by the ignorant, negligent, or wanton manner in which they conduct the business of their employer. The loss must be borne in such cases by the innocent sufferer, or by him whose employment of an ignorant, careless, or wanton servant has been the occasion of the injury; and, under such circumstances, it is just that the latter should bear the loss. But the master is not liable for the independent trespass of his servant. If a coachman, while driving along the street with his master's carriage, sees one against whom he bears ill-will at the side of the street, and leaves the box to seek out and assault him, the master would not be liable. Such an act would be the willful and independent act of the coachman. It was done while in his master's service, but not in the course of that service. But if the coachman sees his enemy sitting on the box of another carriage, driving along the same highway, and he so guides his own team as to bring the carriages into collision, whereby injury is done, the master is liable. The coachman was hired to drive his master's horses. He was doing the work he was employed to do, and for the manner of his doing it the master is liable. Wood, Mast. & Serv. § 277. It would be no defense to the master to prove that he had given his coachman orders to be careful and not drive against others. It was his duty not only to give such orders, but to see that they were obeyed. It will be seen, therefore, that it is the character of the employment, and not the private instructions given by the master to his servant, that must determine the measure of his liability in any given case. An excellent illustration is afforded by the case of Garretzen v. Duenckel, 50 Mo. 104. The defendant was a gunsmith. In his absence from his store a clerk was waiting upon a customer who wanted to buy a rifle. The customer desired to see it loaded, and would not buy unless this was done. The orders of the defendant to his clerk were that he should not load a rifle in the store. The customer was so earnest in his desiring it that the clerk loaded it, and by accident it was discharged, the ball injuring the plaintiff, who was sitting at a window on the opposite side of the street. The defendant set up his orders to his clerk as a defense, but it did not prevail.

These directions show that Dearborne knew that the errand on which he sent his employees was one that was likely to result in trouble, and would require to be managed with great coolness and care, in order to avoid collision and a breach of the peace. But, however, the rule may be held in regard to the criminal liability of the master under such circumstances, it is very clear that he cannot escape liability civilly by virtue of his instructions to his servant as to the manner of doing an act which the servant is to undertake on his behalf. He knew that the invasion of McClung's house in the manner contemplated was likely to excite indignation and resistance on the part of the inmates, and that what ought to be done might have to be determined under excitement, and without time for consultation or reflection by his employees. Under such circumstances, he puts them in his own stead, and he is bound by what they do in the effort to do the thing which was committed to them. Sanford v. Railroad Co., 23 N. Y. 343; Railway Co. v. Rosenzweig, 113 Pa. St. 519, 6 Atl. Rep. 545; Railroad Co. v. Donahue, 70 Pa. St. 119; Hays v. Millar, 77 Pa. St. 238; Garretzen v. Duenckel, *supra*. The defendant was bound not only to give proper instructions to his servants when sending them on such an errand, but he was bound to see that his instructions were obeyed. In the leading English case of Seymour v. Greenwood, 6 Hurl. & N. 359 (referred to at some length in Wood, Mast. & Serv. § 297), it is said: "If the act is done within the scope of the servant's employment, and is done in the master's service, an action lies agsinst the master, and he is liable even though he has directed the servant to do nothing wrong." Here Fox and his helpers were sent to bring away the organ. The acts complained of were committed in the course of, and as a means to, the accomplishment of that for which they were sent. Let it be conceded that they were instructed to do no wrong, and that they did what they were warned not to do. The master is nevertheless liable. When he sends them upon an errand that exposes them to resistance and danger, and the excitements consequent upon the presence of such a state of things, he must take the chances of their self-control and ability to obey. If he finds the risk inconveniently expensive, he may conclude to respect the homes of inoffensive citizens, and rely on his legal remedies for the recovery of any property to which he may claim title thereafter.

CRIMINAL SEDUCTION.

Definition of Seduction.—The definition of the word, seduction, by the law dictionaries, is extremely broad and comprehensive. Thus: "Seduction is where a man induces a woman to have connection with him by taking advantage of her affection for him, or by promising her marriage, or by some similar means."[1] This definition does not require that the woman should be of previous chaste character, and would make an act of intercourse with a common strumpet seduction, provided it was induced "promising her marriage or by some similar means;" but mere illicit intercourse is not seduction, although a promise of marriage be made.[2] Bouvier defines seduction to be "the act of a man in inducing a woman to commit unlawful sexual intercourse with him."[3] But all sexual intercourse between a

[1] Rapalje & Lawrence's Law Dictionary, 1165.
[2] People v. Clark, 33 Mich. 112.
[3] 2 Bouvier's Law Dictionary, 508.

man and woman, who are not husband and wife, is unlawful, and generally results from some inducement held out by the man to the woman; but "an act of sexual intercourse induced simply by a mutual desire of the parties to gratify the sexual passion is not seduction."[4] Webster defines seduction as "the act or crime of persuading a female, by flattery or deception, to surrender her chastity;" and our State courts, in the later and better considered cases, seem to be inclined to accept the definition of Webster, rather than the definitions of the law-lexicographers. In People v. Clark, the court, in substance, say: Illicit intercourse alone will not constitute seduction. In addition to this, the complainant, relying on some sufficient promise or inducement and without which she would not have yielded, must have been drawn aside from the path of virtue she was honestly pursuing at the time the offense charged was committed. The nature of the promise, and the previous character of the woman as to the chastity, must be considered. If she had already fallen, and was not at the time pursuing the path of virtue, but willingly submitted to sexual intercourse as opportunity offered, the mere fact of a promise made at the time would not make the act seduction.[5] Every illicit connection is not seduction. It cannot be said a woman was drawn aside from the path of virtue unless she was honestly pursuing that path when the party charged with seduction approached her.[6] "The word seduction bears with it, as its own intrinsic and separate meaning, the idea of destroyed chastity. Though a general term and having a variety of meanings, according to the subject to which it is applied, it has, when used with reference to the conduct of a man toward a female, a precise and determinate signification, and is universally understood to mean an enticement of her on his part to the surrender of her chastity by means of some art, influence, promise or deception calculated to accomplish that object, and to include the yielding of her person to him, as much as if it was expressly stated.[7] To constitute seduction the female must be first seduced; that is, corrupted, deceived, and drawn aside from the path of virtue; and second, she must be debauched, that is, carnally known.[8] And the object of all criminal statutes upon the subject seems to be the protection of the chastity of the female.

Force.—Force is one of the constituent elements of rape, but not of seduction. The definition of seduction excludes the idea of force as necessary to constitute the offense, and indicates that the woman yields her consent to the act of intercourse, induced thereto, not by fear or force, but by some influence, promises, arts or means used by the man, as by gaining her affection and promising her marriage; therefore, when force is used in obtaining sexual connection with the woman, the offense is not seduction, but rape. An indictment for seduction is not supported by proof that the defendant accomplished his purpose by force, and he is entitled to such an instruction if there is any evidence of force.[9] But, if her consent is obtained to the act of sexual intercourse by a promise of marriage, it is seduction, although force was also used upon her.[10] If the defendant committed rape he cannot be guilty of seduction.[11]

Under Promise of Marriage. Must Promise be Valid?—Almost all, if not all, of the statutes making seduction a criminal offense, require that the act of sexual intercourse should be "under promise of marriage," and this promise must be relied on by the complaining witness, and must be the moving cause leading to the act of intercourse. There is some conflict in the decisions whether the promise must be a valid and binding one, or whether a promise to marry, known to the defendant at the time to be impossible of performance, is sufficient to sustain the action. It has been

[4] People v. DeFore, 31 N. W. Rep. 585; s. c., 8 Am. St. Rep. 863.

[5] 33 Mich. 112.

[6] Com. v. McCarty, 2 Clark, 135.

[7] State v. Bierce, 27 Conn., 319; Dinkey v. Com., 55 Am. Dec. 542; Patterson v. Hayden, 17 Oreg. 238; s. c., 11 Am. St. Rep. 822; State v. Patterson, 88 Mo. 88.

[8] State v. Reeves, 10 Am. St. Rep. 349; s. c. 97 Mo. 668.

[9] State v. Lewis, 48 Iowa, 578; s. c. 30 Am. Rep. 407; People v. DeFore, 64 Mich. 693; s. c., 31 N. W. Rep. 585; 8 Am. St. Rep. 863.

[10] People v. DeFore, *supra*.

[11] State v. Horton, 6 S. E. Rep. 638; s. c., 100 N. C. 443; 6 Am. St. Rep. 613. The intercourse must be the result of seductive arts, and not of fear or force. Croghan v. State, 22 Wis. 424; State v. Kingsley, 39 Iowa, 439; State v. Lewis, 30 Am. Rep. 407. But it seems to be no objection to the maintenance of a civil action for the seduction of the plaintiff's daughter, that the sexual intercourse between the daughter and the defendant was had by force. Kennedy v. Shea, 110 Mass. 147; s. c., 14 Am. Rep. 584.

held that an action for the breach of a promise to marry may be sustained, where the defendant was, at the time, a married man, if the plaintiff was ignorant of the fact.[12] In the case of Callahan v. State,[13] where a statute made it felony for any person, under promise of marriage, to have illicit carnal intercourse with a female infant of good repute for chastity, it was held that the promise need not be a valid one in fact, if the infant understood it to be valid; and the indictment need not allege that the defendant was unmarried at the time; and the promise may be conditioned upon the woman's consent to sexual intercourse.[14] It therefore appears that, if the person seduced believed the promise to be valid, it is not necessary that it should in fact be valid. But the defendant is entitled to give evidence of previous acts of sexual intercourse between himself and the complaining witness to show that the alleged act was not committed under a promise of marriage.[15]

Previous Chaste Character.—Some statutes prescribe as a prerequisite to a conviction for seduction in a criminal action that the woman should be of previous chaste character. When this is the case, the previous chastity of the woman must be proved by the prosecution by witnesses produced in open court, or the law must presume the chastity of the female; and, if the presumption of chastity obtains, it can be rebutted only by evidence sufficient, at least, to raise a reasonable doubt in the minds of the jury on that point. In other words, the presumption of chastity must, in so far as it is inconsistent with the presumption of innocence with which the law, in its mercy, clothes the defendant, outweigh and overcome such presumption. So far as the chastity of the female is concerned, the law presumes, if such be the holding in the particular jurisdiction, that the defendant is guilty, unless he is able to rebut the presumption by proof of prior acts of sexual intercourse with himself, which is hard to do, because such acts are not committed in the broad light of day and in open, public view, or by proof of such acts with third parties, which is equally hard for the same reason, unless such third parties will place themselves upon the witness stand and testify to their own disgrace; and, when they do so, juries are not inclined to give them any credit, if the woman will deny their testimony. But actual chastity would be hard to prove by any one except the prosecutrix herself. She, of course, would be a competent witness for this purpose. She could testify that she had never had sexual intercourse with any one except the defendant, and that she did not have such intercourse with him until he promised her marriage, or exercised some of those other seductive arts and influences which the law holds to be sufficient; the question of her credibility would, of course, be left for the jury to determine. I think, however, that, when the law makes a certain fact, which is susceptible of affirmative proof, a necessary ingredient of a criminal offense, such fact should never be presumed, but the prosecution should always be required to prove it beyond a reasonable donbt in order to secure a conviction. It may, at first blush appear unjust to require a woman to prove affirmatively that she is chaste, but would it not work a greater hardship to compel the defendant to assume the burden of proof, and require him to negative one of the constituent elements of the offense with which he is charged? A seduction case may be hard for the prosecutrix to make out, but, as a general rule, it is still harder to defend, and the burden of proof should never be placed, in the first instance, on the unfortunate defendant. If one or the other of the presumptions must fail without proof to sustain it, let it, by all means, be the presumption of chastity. Public sympathy will always be with the party claiming to have been seduced, and, without invoking the presumption of chastity in her favor, a sympathetic jury, composed exclusively of men, will always find for her without stopping to inquire whether or not there is a reasonable doubt of her chastity. In fact, the jury will, of their own accord, place on the defendant the burden of proving the unchastity of the complainant, and, in all probability, not believe him, if he succeeds in so doing. Referring to the inclination of juries to favor women, one writer says: "Especially will they liberally award damages

[12] Cover v. Davenport, 1 Heisk. 368: s. c., 11 Am. Rep. 706; Kelly v. Riley, 106 Mass. 339; s. c., 8 Am. Rep. 336.

[13] 63 Ind. 198: s. c., 30 Am. Rep. 211.

[14] See also Kenyon v. People, 84 Am. Dec. 177. *Contra*, Wood v. State, 48 Ga. 192; s. c., 15 Am. Rep. 664.

[15] Bowers v. State, 29 Ohio St. 542.

when one side is powerful and the other weak. A weak woman is almost sure to be dealt with very liberally if a man be the adverse party."[16] The woman must be chaste at the time of the alleged seduction, and a reasonable doubt as to her chastity is fatal to a conviction.[17] Character refers to moral qualities, and not to reputation, and evidence of reputation is not admissible upon the issue of character, but only to impeach or corroborate testimony regarding particular acts of unchastity.[18] Chaste character means actual personal virtue, and not reputation, and requires specific acts of lewdness for impeachment.[19] Previous chaste character is presumed, and the State is not required to prove it.[20] And in the case of Andre v. State, the court held that "previous chaste character" meant more than actual chastity simply; that it meant also "purity of mind and innocence of heart."[21]

What is Sufficient to Establish Unchaste Character.—Defendant may show that, before the time of the alleged seduction, the prosecutrix was guilty of sexual intercourse with other men than defendant.[22] He may show that she had been guilty of obscenity of language, indecency of conduct, and undue familiarity with other men, and the like;[23] give evidence of improper conversations or associations with other men;[24] that, before the alleged seduction, she was often out late at night;[25] that she had been guilty of lewd and indecent conduct, that her language was that of a person lost to all sense of virtue and propriety, and that on one occasion, being asked why she did not resort to prostitution for a living, she replied, "I am not ready yet,"[26] and by evidence of prior illicit intercourse with defendant.[27] In a Michigan case, under a statute which used the words "any unmarried woman," without adding "previous chaste character," it was held that any act of carnal intercourse, to which the consent of the prosecutrix was obtained by a promise of marriage at the time, constituted seduction, though there were previous acts of intercourse between the parties induced by a like promise.[28] This does not require the woman to be of chaste character at the time of the alleged seduction; for it appears that there had been previous acts of intercourse between the parties, and no proof of reformation. Her chastity and virtue had been surrendered to the defendant, and just why its surrender to him should not render her unchaste, when its surrender to a third person would do so, is more than I can understand. Yet in the case of People v. Clark,[29] under the same statute, it was held competent for the defense to show that the prosecutrix had, previous to the alleged offense, had illicit connection with another man. Yet it was held in State v. Brinkhaus,[30] "although a female may, from ignorance or other causes, have so low a standard of propriety as to commit or permit indelicate acts or familiarities, yet if she have enough of the sense of virtue that she would not surrender her person, unless seduced to do so under a promise of marriage, she cannot be said to be a woman of unchaste character, within the meaning of the statute."

Good Repute for Chastity.—Other statutes require that the female alleged to be seduced should be "of good repute for chastity," in lieu "of previously chaste character." Under these statutes there can be no presumption, which will come in conflict with the presumption of innocence, but the prosecution must affirmatively and distinctly prove the good repute of the female.[31] It is not competent for the defendant to prove particular acts of unchastity or specific acts of illicit intercourse by the prosecutrix with other persons. It is the reputation and age of the fe-

[16] The Work of the Advocate, 150.

[17] Wilson v. State, 73 Ala. 527; State v. Deitrick, 51 Iowa, 467; s. c. 1 N. W. Rep. 732.

[18] State v. Prizer, 49 Iowa, 531; s. c., 31 Am. Rep. 155.

[19] Kenyon v. People, 26 N. Y. 203; S. c., 84 Am. Dec. 177; Polk v. State, 40 Ark. 482.

[20] State v. McClintic, 35 N. W. Rep. 696; s. c., 75 Iowa, 663; People v. Brewer, 27 Mich. 134; Andre v. State, 5 Iowa, 389; s. c., 68 Am. Dec. 708; *Contra*, State v. Wentz, 42 N. W. Rep. 933.

[21] 5 Iowa, 389.

[22] State v. Wheeler, 7 S. W. Rep. 103.

[23] Andre v. State, 5 Iowa, 389.

[24] West v. Druff, 55 Iowa, 332; s. c., 7 N. W. Rep. 707.

[25] State v. Clemons, 42 N. W. Rep. 562.

[26] State v. Primm, 11 S. W. Rep. 732.

[27] State v. Brassfield, 81 Mo. 151.

[28] People v. Millspaugh, 11 Mich. 278.

[29] 33 Mich. 112. See also, Polk v. State, 48 Am. Rep. 17.

[30] 25 N. W. Rep. 642; s. c., 34 Minn. 285.

[31] Oliver v. Com. 101 Pa. St. 215; s. c., 47 Am. Rep. 704; Criskie v. State, 14 Vroom, 640; s. c., 39 Am. Rep. 10.

male, and not her previous conduct, that bring her within the protection of the statute.[32] "A woman's reputation for chastity is what the people of her acquaintance generally say of her in this regard; that is, the general credit for chastity which she bears among her neighbors and acquaintances. The best character is generally that which is least talked about; therefore negative evidence of a witness, that he never heard anything against the character of the woman for chastity, that is, that he never heard her conduct criticised, condemned, or even talked about, is admissible upon the trial.[33] But the case of State v. Brassfield[34] has been overruled by the later case of State v. Patterson.[35] In this latter case, Sherwood, J., who delivered the opinion of the court, says: "*How can that be destroyed by the seducer's insidious wiles and arts which, at the time of its supposed destruction, had no existence?* Any evidence, therefore, which shows, or materially tends to show that there was, at the time the alleged offense is charged to have been committed, *no chastity*, in the given case cannot be otherwise than competent and relevant. I cannot believe that the legislative protection, intended only for the *pure and innocent* in heart, was designed to be extended over those who, being vile and impure, *have nothing left for the law to guard.*" (The italics are those of Judge Sherwood.) It seems to me that a court would naturally presume that legislators were men of common sense, and had some knowl- of the meaning of words, and, further, that they were able to distinguish the difference in meaning between the words "of previous chaste character," and the words "of good repute for chastity." Reputation is what the neighbors say of one; character is the reality, what the person actually is. Proof on the trial that the prosecuting witness had had sexual intercourse with men, other than the defendant, would affect her present and future, but not her past reputation. Her reputation for chastity might have been good, but she may not have been, as a matter of fact, of chaste character. Acts of sexual intercourse, which are known only to the parties engaged, cannot and do not affect the reputation of the female for chastity. Why, then, should evidence of such acts on a trial for seduction be permitted to do so? Evidence of the reputation of the prosecutrix for morality and virtue at the time of the trial is inadmissible, as her reputation at that time would be injuriously affected.[36]

Exhibit of Child Before Jury as Evidence.—In Iowa, it is held that, on a trial for seduction, a child, claimed to have been born of the alleged intercourse, cannot be exhibited to the jury as corroborative evidence for the prosecution on account of its resemblance to the defendant.[37] While, in North Carolina it is held that the child alleged to be the result of such intercourse may be exhibited to the jury to corroborate the fact of such intercourse.[38] Several decisions in bastardy cases are given in the note below.[39]

Corroboration of Prosecutrix.—Most of the statutes on the subject of criminal seduction require the evidence of the prosecutrix should be corroborated; but the only question presented to courts of last resort on this branch of evidence in seduction cases is, "Was the evidence admitted on the trial sufficient for the purpose," that is: "Did it corroborate the testimony of the prosecutrix to such an extent as to justify the verdict of guilty?" Therefore, the most that can be done is to give what the courts have held, in a few cases, to be sufficient or insufficient corroborative evidence. The general rule undoubtedly is, that it is not necessary that there should be direct and positive corroborative evidence; but it is sufficient if there are such facts and circumstances as fairly tend to support the evidence of the prosecutrix, and satisfy the jury that she is entitled to credit.[40]

[32] State v. Bryan, 8 Pac. Rep. 260; s. c., 34 Kan. 63; Bowers v. State. 29 Ohio St. 542; State v. Brassfield, 81 Mo. 151.

[33] State v. Bryan, *supra.*

[34] 81 Mo. 151.

[35] 88 Mo. 88.

[36] People v. Brewer, 27 Mich. 134.

[37] State v. Danforth, 48 Iowa, 43; s. c., 30 Am. Rep. 387.

[38] State v. Horton, 6 S. E. Rep. 238; s. c., 100 N. C. 443; 6 Am. St. Rep. 613.

[39] Favoring the exhibition: Gaunt v. State. 14 Atl. Rep. 600; State v. Smith, 37 Am. Rep. 192; Gilmanton v. Ham, 38 N. H. 108; Finnigan v. Dugan, 14 Allen, 197; State v. Woodruff, 67 N. C. 89. Opposing admission: Clark v. Broadstreet, 15 Atl. Rep. 56; Hanwalt v. State, 54 Am. Rep. 588; State v. Danforth, 48 Iowa, 43; Risk v. State, 19 Ind. 152; Reitz v. State, 33 Ind. 187; Robnett v. People, 16 Ill. App. 279.

[40] State v. Brinkhaus, 25 N. W. Rep. 642; s. c., 34 Minn. 385.

What held Sufficient. — Other evidence showing that the defendant had been waiting on her some time as a lover, coming to see her several times a week, on which occasions he was frequently alone with her, and the testimony of her brother that on one occasion, when talking about marrying prosecutrix, defendant said his parents opposed the marriage, but he didn't care, he would do as he pleased; that they would not have to live with her when he married her.[41] Evidence of circumstances which usually accompany the marriage engagement will satisfy the statute.[42] Proof that the parties kept company together and acted as lovers.[43] Statements by the defendant that he had seduced the prosecutrix, that she was a respectable girl, and that he had arranged to elope with her, but was prevented by accident, together with the testimony of a life-long acquaintance to the good character of the girl.[44] Letters written by defendant, showing intimacy, courtship, etc.[45] The prosecutrix may testify that afterwards she gave birth to a child, and may state the date of birth. She may also state that the child with her is the one alleged to have been begotten by defendant.[46] In New York corroboration is not necessary as to the fact that prosecutrix was an unmarried female of previously chaste character.[47] In Missouri corroboration is required only as to promise of marriage, but, in that respect, to the extent of the principal witness in perjury.[48]

What not Sufficient.—That defendant had the opportunity to employ arts, deceptions, and false promises is insufficient.[49] And, where the statute requires the woman to have been of previously chaste character, evidence of general bad character for chastity, without proof of any specific act of sexual intercourse, is not sufficient, for "character" may mean only reputation.[50] Evidence of improper conduct of the prosecutrix eight years before the trial, when she was only fourteen years of age, is not sufficient.[51]

Reformation.—When a woman's reputation for chastity, in the community in which she lives, is bad, she may so live, act and conduct herself as to overcome that bad repute, and establish for herself a good reputation in that respect; but when a woman has once willingly submitted to sexual intercourse, when her actual chastity has been violated, can she ever so conduct herself as to again become a woman of "chaste character?" A repntation for a particular quality, once lost, may be regained, but can chastity, once destroyed, ever be restored? Morally speaking, virtue, once gone, is gone forever, but it seems that, in the eye of the law, she can reform, and, so far as a criminal action for seduction is concerned, she may become a woman of previous chaste character. Although a woman may have fallen, yet if she repent and reform, she may be the subject of seduction.[52] Where defendant and prosecutrix had had illicit intercourse for more than a year, when defendant went away, and prosecutrix reformed and led a chaste life until after defendant's return, in about a year, when, under a promise of marriage, their relations were resumed this was held sufficient evidence of reformation.[53] On the contrary, where it appeared that intercourse between the parties had been customary until several months before the time when it was claimed the seduction took place, and that the defendant, during the interval, had been away, it was held that no legal presumption of reformation arose.[54] Where illicit intercourse has taken place between the parties as opportunity offered, at short intervals, to warrant a conviction for the second or third or later act there should be clear and satisfactory proof of reformation.[55]

[41] State v. Brinkhaus, *supra*.

[42] State v. Hill, 4 S. W. Rep. 121; s. c., 91 Mo. 423; State v. Brassfield, 81 Mo. 156.

[43] State v. McClintic, 35 N. W. Rep. 676.

[44] Hausenfleck v. Com., 8 S. E. Rep. 683.

[45] State v. Beil, 44 N. W. Rep. 244.

[46] State v. Clemons, 42 N. W. Rep. 562. See also, Hausenfleck v. Com., *supra*, and Cunningham v. State 73 Ala. 51.

[47] People v. Kearney, 17 N. E. Rep. 737.

[48] State v. Hill, *supra*.

[49] State v. Smith, 54 Iowa, 743; s. c., 7 N. W. Rep. 402; State v. Araah, 55 Iowa, 528; s. c., 7 N. W. Rep. 601.

[50] Hussey v. State, 5 South. Rep. 484.

[51] State v. Dunn, 53 Iowa, 526; s, c., 5 N. W. Rep. 707.

[52] Wilson v. State, 73 Ala. 527; Patterson v. Hayden, 17 Oreg. 238; s. c., 11 Am. St. Rep. 822; State v. Carron, 18 Iowa, 372; s. c., 87 Am. Dec. 401; State v. Timmens, 4 Minn. 325; State v. Brassfield, 81 Mo. 151.

[53] State v. Moore, 43 N. W. Rep. 273.

[54] People v. Squires, 49 Mich. 487; s. c., 13 N. W. Rep. 828.

[55] People v. Clark, 33 Mich. 112.

The Promise of Marriage.—In the prosecution for seduction under promise of marriage, it is not necessary that the promise should have been expressed in any set form or in any particular language. It is sufficient if language was used which implied such a promise, or was intended to convey that meaning, and was in fact so understood by the prosecutrix.[56]

The Indictment.—In general, it is sufficient to charge the offense in the words of the statute;[57] but where the statute used the words "under promise of marriage," and the indictment charged the offense to have been committed "by means of a promise of marriage," the indictment was held good.[58] An indictment for seduction under a promise to marry must show that the woman was of chaste character immediately previous to and down to the alleged seduction. It is not enough to allege that she was of chaste character previous to the promise to marry, or previous to the day on which the seduction is alleged to have been committed.[59] It need not state with particularity the facts constituting the crime.[60] Nor is it demurrable for containing two counts, the seduction being laid on different days in each count.[61] An information that fails to allege that the prosecutrix was a single woman, will support a conviction.[62]

D. R. N. BLACKBURN,

Albany, Oregon.

[56] State v. Brinkhaus, 25 N. W. Rep. 642; s. c., 34 Minn. 285.
[57] State v. Curran, 51 Iowa, 112.
[58] West v. State, 1 Wis. 209.
[59] State v. Gates, 27 Minn. 52; s. c., 6 N. W. Rep. 404.
[60] State v. Conkright, 58 Iowa, 338; s. c. 12 N. W. Rep. 283.
[61] Hausenfleck v. Com., 8 S. E. Rep. 683.
[62] State v. Bryan, 8 Pac. Rep. 260; s. c., 34 Kan. 63.

THE "ORIGINAL PACKAGE" DECISION.

In the case of Leisy *et al.* v. Hardin, recently decided by the Supreme Court of the United States, there was drawn in question the validity of certain statutes of the State of Iowa, relating to the sale of intoxicating liquors, upon the ground of their repugnance to the third clause of section 8, article 1, of the constitution of the United States, which confers upon congress the power to regulate commerce. The decision was against their validity. Six of the judges concurred in the opinion, which was delivered by Chief Justice Fuller. Justices Grey, Harlan and Brewer dissented. This opinion was published in full in 30 Cent. L. J. 480. From that opinion it will appear, that the right of importation carries with it the right to sell the imported article. There is nothing new, however, in this point. It is as old as the days of Chief Justice Marshall. It is further held in the opinion under consideration, that while the imported article remains in the hands of the importer unsold, and in the "original package," the State cannot interfere by seizure, or any other action, in prohibition of importation and sale, by the foreign or non-resident importer, *unless by the permission of congress;* and it is this latter clause which has earned for the decision its wide celebrity. It should be remembered that it is clause three, of section 8, relating to the regulation of commerce, which is under consideration; and we must not confound this with section 10, of the same article, where congress is expressly authorized to "consent" that the States may levy and collect taxes and imposts.

As was clearly pointed out many years ago by Chief Justice Marshall, the taxing power, under the constitution, is totally distinct from the power to regulate commerce. This latter power is confided to congress alone, and nowhere in the constitution is there the least intimation that congress may delegate its exercise to the States.

In addition to the fact that no such authority is expressly given in the clause relating to commerce, is the further fact that, in section 10 of the same article, the power is directly conferred upon congress to authorize the states to levy and collect taxes. Thus, while considering both subjects, the regulation of commerce, and the imposition of taxes, in the same article of the constitution, the framers of the instrument conferred upon congress authority to delegate the power to the States in the one instance, and withheld it in the other. In addition to this, if congress should attempt to confer upon the States the power to regulate commerce, either in direct terms, or, what would amount to the same thing, by declaring that the imported article shall become subject to the operation of the laws of the State immediately upon its entry within its boundary, and before it had been sold by the importer, the purpose of the constitution in this regard would be defeated, at least as far as the particular article of commerce in question is concerned; for it is well known, indeed openly avowed, that the object and purpose of the State law is to utterly destroy the imported article. This would indeed be a "regulation" of commerce! To use the language of Lord Coke, it would be *quasi agnum lupo committere.*

The conclusion then would seem to be unavoidable, that congress does not possess the power to grant to the States permission to regulate commerce. As Chief Justice Marshall said, in Gibbons v. Ogden, 9 Wheaton, "*it may be admitted that congress cannot give a right to a State in virtue of its own powers;*" and to use the language

of the present Chief Justice: "The State cannot interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer." Yet, the court has left it to be inferred, that congress may do so; and, acting upon this intimation or inference, for it is an intimation merely, not an adjudication, the matter has been brought to the attention of congress by Senator Wilson, of Iowa, who introduced a bill for the purpose, which was discussed, amended and passed, and is now before the house. The judiciary committee of the house has reported a bill of its own, and thus the matter stands at the moment of this writing, June 30th. Both bills are here given, that the reader may compare them with the constitution, and judge for himself as to their validity.

The Wilson Bill.—"A bill to limit the effect of the regulations of commerce between the several States, and with foreign countries, in certain cases. Be it enacted, etc., that all fermented, distilled, or other intoxicating liquors, or liquids transported into any State or territory, or remaining therein for use, consumption, sale or storage, shall, on arrival in such State or territory, be subject to the operation and effect of the laws of such State or territory, enacted in the exercise of its police powers, to the same extent, and in the same manner, as though said liquors, or liquids had been produced in such State or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The House Bill.—"That whenever any article of commerce imported into any State from any other State, territory, or foreign nation, and there held or offered for sale, the same shall be subject to the laws of such State, provided that no discrimination shall be made by any State in favor of its citizens against those of other States in respect to the sale of any article of commerce, nor in favor of its own products against those of like character produced in other States. Nor shall the transportation of commerce through any State be obstructed, except in the necessary enforcement of the health laws of such State."

The following extract from the opinion of Chief Justice Marshall, in one of the earliest decisions on the subject (Gibbons v. Ogden, 9 Wheaton), will be read with interest: "We must first determine whether the act of laying duties or imposts on imports or exports, is considered in the constitution as a branch of the taxing power, or, of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section. 'Congress shall have power to lay and collect taxes, duties, imposts and excises;' and before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is, that all duties, imposts and excises shall be uniform. In a separate clause, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution then considers these powers as substantive and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imposts is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject, and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce. 'A duty of tonnage' is as much a tax as a duty on imports or exports, and the reason which induces the prohibition of those taxes extends to this also. This tax may be imposed by a State with the consent of congress; *and it may be admitted that congress cannot give a right to a State in virtue of its own powers.* But a duty of tonnage, being part of the power of imposing taxes, its prohibition may certainly be made to depend on congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the State from exercising this power."

Section 10, of article 1, to which the court referred as giving congress the power to authorize the States to levy and collect taxes, is in these words: "No State shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No State shall, without the consent of congress, lay any duty of tonnage."

The only instance, then, in which congress is authorized to give its "consent" to the State is, that they may "lay imposts or duties on imports or exports, and on "tonnage." This authority to "consent" does not extend to, or include the regulation of commerce, which is an entirely distinct power from the other, and can be exercised by congress only. It is to be hoped, then, that congress will pause before attempting to divest itself of a power conferred upon it alone by the constitution. If this power may be frittered away between the States, its national character will soon be lost sight of, and the Great Instrument, intended to be the supreme law of the land, will become a thing of "shreds and patches."

FRANCIS MINOR.

LIS PENDENS.

BENTON V. SHAFER.

(Supreme Court of Ohio, March 4, 1890.)

1. *Lis Pendens — Jurisdiction of Court—Notice.*—Under Ohio law the pendency of a suit, in one county, affecting the title of land lying wholly in another county, is not constructive notice thereof to a *bona fide* purchaser thereof for value from one of the parties to such suit.

2. *Lis Pendens—Jurisdiction over Subject-matter.*—When the court has not jurisdiction over the subject-matter involved in the suit, the doctrine of *lis pendens* does not apply.

DICKMAN, J.: The object of the suit in Union county was to set aside the deed of conveyance, executed by Phebe Benton to Daniel S. Benton and Lewis Benton, of the tract of land in Delaware county, upon which Mary J. Shafer holds the mortgage in controversy; also to recover the real property embraced in the mortgage, and to cause partition of the same to be made among the heirs of Phebe Benton. In the same suit partition among the same heirs was sought of another tract of land situated in Union county. The land in Union county is not a continuous and entire tract with the land in Delaware county, but the two are separate and independent tracts, several miles apart. Although, when the estate is situated in two or more counties proceedings for partition may be had in any county wherein a part of such estate is situated, and also in actions to recover real property, when the property is an entire tract, yet, in partition, each tenant in common, coparcener, or other interested person, is entitled to be named as defendant therein; and in an action to recover real property in an entire tract, and situate in more than one county, all persons claiming title to or an interest in the property may be made defendants. Conceding that all the proper parties were before the court at the commencement of the action in Union county, and up to the time when Mary J. Shafer received her mortgage from Daniel S. Benton, the question arises whether, upon the agreed facts in the present case, she is to be concluded by the judgment rendered in the Union county action. To that action she was not a party. At the date of its commencement, and ever since, she has been a resident of Delaware county; and she had no actual notice of the suit in Union county, or of the proceedings therein, when Daniel S. Benton executed and delivered to her the note and mortgage in litigation. She took her mortgage after searching the records of Delaware county, where she found the deed from Phebe Benton to Daniel S. Benton duly recorded, and no record of any lien or pending suit affecting the title of the Delaware county land. The decision of the court of common pleas of Union county was rendered May 13, 1881, and the final decree in the action was rendered, on appeal, March 10, 1883, by the district court. The mortgage to Mary J. Shafer bears date October 28, 1882, and was filed for record November 11, 1882. It is contended, therefore, that notwithstanding the facts in the case, as the suit in Union county was pending when Daniel S. Benton executed and delivered to her the mortgage on the lands in Delaware county, she acquired no interest in the subject-matter of the suit as against the title of Lewis Benton, the purchaser at the partition sale, and the other plaintiffs in error. The rule concerning the effect of *lis pendens*, unmodified by statute, would seem, in some instances, stern and inequitable in its operation. In Bellamy v. Sabine, 1 De Gex & J. 566, it was said by Cranworth, Ch.: "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describe its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the oposite party." And yet the doctrine of notice has not been eliminated in determining the effect of alienating property in dispute, pending the litigation. But the rule concerning constructive notice by *lis pendens* has always been regarded by the courts as a harsh one in its application to *bona fide* purchasers for value. In Hayden v. Bucklin, 9 Paige, 512, Chancelor Walworth said: "This common-law rule of requiring purchasers at their peril to take notice of the pendency of suits in courts of justice, for the recovery of the property they are about to purchase, although it is nearly immpossible that they should actually know that such suits have been commenced, has always been considered a hard rule, and is by no means a favorite with the court of chancery." The stringency of the rule had led the English parliament and the legislatures of many States to interfere, resulting in most material statutory modifications and restrictions. An example of such legislation is found in the English statute which provides that a pending suit will not affect a purchaser for value, and without express notice, unless a notice of *lis pendens* has been properly registered in compliance with the statutory directions. St. 2 & 3 Vict. ch. 11, § 7; 2 Pom. Eq. Jur. §§ 639, 640.

Our own statutory provisions are found in section 5055 and 5056 of the Revised Statutes. Section 5055 reads as follows: "When the summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency; and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title." Under this section, if the land mortgaged to Mary J. Shafer had been situated in Union county instead of Delaware county, she would have taken the mortgage with constructive notice of the pending litigation, and would have acquired no interest in the property as against the title of the plaintiffs in the action. The general rule is that, as to real property located within the jurisdiction of the court where its judgments and

decrees may become or be made liens upon the property, all men must take notice of and be bound by the pending litigation without regard to residence. But a mortagee of real property not part of an entire tract situate in more than one county will not be charged with constructive notice of an action for the recovery of such property pending in a county other than that in which the property is situated. Section 5056 of the Revised Statutes, on the subject of *lis pendens* as to suits in other counties, provides as follows: "When any part of real property, the subject-matter of an action, is situate in any county or counties other than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the recorder's office of such other county or counties before it shall operate therein as notice so as to charge third persons, as provided in the preceeding section; but it shall operate as such notice, without record, in the county where it is rendered." By this section of the statutes, where part of the real property in litigation is located in the county where the action is brought, and part in another county, the judgment, in the county where it is rendered, is made to operate as notice of the pending of the action without record. In the county where the action is brought and judgment rendered, and the real property, or a part thereof, is situated, it is presumed, under the statute, that a purchaser of the subject-matter of the suit situated in that county has knowledge of the prior proceedings upon which the judgment is founded, without regard to its record; but, in a county where the action is not brought, and the judgment is not rendered, and the title to real property therein located is sought to be changed or affected, a purchaser is not presumed to have such knowledge of the pending action or proceedings leading to the judgment, and hence the statute requires the judgment to be recorded in such county before it can operate therein as notice to a purchaser, as provided in the preceding section (5055) of the Revised Statutes. In the case at bar it is among the agreed facts that the proceedings or decree rendered in the suit in Union county have not been recorded in the county of Delaware. If the purchaser of a tract of land situated entirely in the county of his domicile, who has no actual notice or information of any judicial proceedings in any county in reference to such land, searches the records of the county where the land is located, and finds no pending proceedings, judgment liens, or other incumberances affecting the title to the same, it is not the intent of the statute that such purchaser shall be compelled to examine the records of the courts of every county in the State to find whether a suit is pending that would affect the title; and the section of the statute now under consideration, in the protection of the innocent purchaser for value and without actual notice, accordingly provides that a judgment rendered in a county other than that in which the purchased part of the land lies shall be recorded in the county where such land is situated before it shall operate therein as notice of the pendency of an action in the county where such judgment was rendered. But the doctrine of *lis pendens*, which has been invoked in behalf of the plaintiffs in error, rests upon the jurisdiction of the court over the subject-matter involved in the suit. "To make the pendency of a suit notice so as to affect the conscience of a purchaser it is essential that the court have jurisdiction over the thing." McLean, J., in Carrington v. Brents, 1 McLean, 167. In Jones v. Lusk, 2 Metc. (Ky.) 356, it is said by Duvall, J.: "Unless the petition shows upon its face a case for the jurisdiction of the chancellor, the proceeding cannot operate as a *lis pendens*, even from the date of the service of process, so as to affect the property sought to be subjected, or to overreach a subsequent sale or other disposition of it." See, also, Fonbl. Eq. book 2, ch. 6, § 3, note *n*; Sorrel v. Carpenter, 2 P. Wms. 482; Worsley v. Earl of Scarborough, 3 Atk. 392; Bishop of Winchester v. Paine, 11 Ves. Jr. 194; Murray v. Ballou, 1 Johns. Ch. 566; Benn. Lis. Pen. §§ 99—100.

It is true that the action in Union conuty was to have partition of lands lying in that county and also in Delaware county, and, when the estate to be partitioned is situated in two or more counties, the proceedings, as before observed, may be had in any county wherein a part of such estate is situated; but the purpose of that action, as appears from the agreed statement of facts, was also to set aside the deed of conveyance made by Phebe Benton to Daniel S. Benton and Lewis Benton of the tract of land in Delaware county, mortgaged to Mary J. Shfaer, "and to recover the said real estate situated in Delaware county." By section 5023 of the Revised Statutes, "when the property is situate in more than one county, the action may be brought in either; but in actions to recover real property this can only be done when the property is an entire tract." The mortgaged real property situated in Delaware county was not part of an entire tract situated in more than one county, but was a separate and independent tract of land located entirely in Delaware county. As the action to recover the real property was brought in Union county, where no part of the land embraced in the mortgage was located, the defendant in error, Mary J. Shafer, cannot be held chargeable with constructive notice of the pendency of the action.

Judgment affirmed.

NOTE.—A purchase made of property actually in litigation, *pendente lite*, for a valuable consideration and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit.[1] It is a rule of the common law, and is founded upon a great public policy: for otherwise alienations made during a suit

[1] Storys' Eq. Jur. (13 Ed.) § 405.

might defeat its whole purpose, and there would be no end of litigation.[2]

What Kind of Property Effected.—This rule applies to real property and to personal property of every description, except negotiable paper not due.[3] Some authorities assert that it does not apply to the sale of articles in market overt in the usual course of trade,[4] or to articles of ordinary commerce.[5] It is said that these exceptions to the rule are demanded by other considerations equally important, as affecting the free operations of commerce, and that confidence, in the instruments by which it is carried on, which is necessary in a business community.[6]

When the Rule Applies.—It is confined to the property actually in litigation and the property must be so described in the pleadings as to give a purchaser notice that the property, which he buys, is that in litigation.[7] Those parties only are charged with notice or affected by *lis pendens* who purchase from parties to the suit.[8] The rule will not apply, unless the court have jurisdiction over the thing, whether it be real property or personal chattels.[9] When personal property of a movable nature is, pending litigation concerning it, withdrawn from the jurisdiction where such litigation is pending, to another State and there sold to a *bona fide* purchaser, the doctrine of *lis pendens* does not apply.[10] Unless otherwise provided by statute, the authorities all agree, that the *lis pendens* commences with service of the process on the defendant to the suit, as to third parties at least.[11] Some authorities, particularly the English, have held the *lis pendens* to commence with the service of the subpœna, though prior to the filing of the bill,[12] yet the better opinion would seem to be, that the bill must be filed as well as subpœna served, before the *lis pendens* commences.[13]

How Lost.—The law of *lis pendens* is a hard rule and is not a favorite with the courts, and a party claiming the benefit of it must clearly bring his case within it, and if he makes a slip, the courts will not assist him to rectify the mistake.[14] The suit must not be collusive,[15] and must be duly prosecuted,[16] but a reasonable excuse for the delay complained of is always available to keep up the *lis pendens*.[17] The *lis pendens* ends with the suit. Where an attorney dismissed a suit, and his client afterwards filed a motion in vacation to reinstate it, but gave no notice thereof to the defendant, it was held that the mortgagee in a mortgage made a few days thereafter by the defendant was not affected by the original notice of *lis pendens*, though the cause was subsequently reinstated.[18]

Jurisdiction of Court.—As to the extent of the domain wherein parties are affected by the rule of *lis pendens*, the courts are at variance. The principal case holds, that it extends only to the county where the court is held. In Kentucky it was impliedly held to extend to a neighboring county, where the land in controversy was situated.[19] In Missouri, in a case relating to personal property, it was held to extend to the entire State.[20]

Statutes Controlling.—Many States have passed statutes, which allow the rule of *lis pendens* to apply only when a notice thereof is filed in a certain office. But the common-law rule exists unless so abolished, and where such statutes apply only to real estate, the common law remains as to personal property.[21] Such State statutes do not apply to proceedings or judgments or decrees in the federal courts.[22]

In the absence of any act of congress, the common law applies. An act of congress was passed Aug. 1, 1888, which required judgments and decrees of the federal courts to be docketed in a State office in order to be liens, where the State has so provided in the case of domestic judgments, but this law only applied in case such State passed a law, authorizing such federal judgments and decrees to be docketed in the manner provided for domestic judgments. It is doubtful, whether all the States, which have such laws have extended them to federal judgments and decrees. It will also be seen that the doctrine of *lis pendens* relative to pending suits is left untouched.

S. S. MERRILL.

2 *Idem.* § 406; Newman v. Chapman, 2 Rand. 93.

3 Carr v. Lewis Coal Co., 96 Mo. 149; Carr v. Cates, 96 Mo. 271; Houston v, Timmerman, 17 Oreg. 499; Kieffer v. Ehler, 18 Pa. St. 388; Winstow v. Westfeldt, 22 Ala. 760; Green v. Rich, 121 Pa. St. 130.

4 Enfield v. Jordan, 119 U. S. 680.

5 Earle, J., in Leitch v. Wells, 48 N. Y. 585; County of Warren v. Marcy, 97 U. S. 96.

6 County of Warren v. Marcy, *supra.*

7 Badger v. Daniel, 77 N. C. 251; Walker v. Goldsmith, 14 Oreg. 125; Miller v. Sherry, 2 Wall. 237.

8 Green v. Rich, 121 Pa. St. 130; Miller v. Sherry, 2 Wall. 237; County of Warren v. Marcy, *supra.*

9 Carrington v. Brents, 1 McLean, 167; Jones v. Lusk, 2 Met. (Ky.) 356; Enfield v. Jordan, 119 U. S. 689.

10 Carr v. Lewis Coal Co., 96 Mo. 149.

11 Williamson v. Williams, 11 Lea, 355.

12 Newman v. Chapman, 2 Rand. 93; Stone v. Tyree, 30 W. Va. 687.

13 Green v. Rich, *supra;* Dudley v. Witter, 46 Ala. 664; Leitch v. Wells, *supra;* Walker v. Goldsmith, 14 Oreg. 125.

14 Walker v. Goldsmith, *supra;* Petree v. Bell, 2 Bush, 58.

15 Green v. Rich, *supra.*

16 Green v. Rich, *supra;* Petree v. Nourse, 114N. Y. 595.

17 Wickliffe v. Breckenridge, 1 Bush, 427.

18 Davis v. Hall, 90 Mo. 659.

19 Wickliffe v. Breckenridge, *supra.*

20 Carr v. Lewis Coal Co., 96 Mo. 149.

21 Leitch v. Wells, 48 N. Y. 585; Carr v. Lewis Coal Co., *supra.*

22 U. S. v. Humphreys, 3 Hughes, 201; Rutherglen v. Wolf, 1 Hughes, 78; Majors v. Cowell, 51 Cal. 478.

BOOKS RECEIVED.

FORMS OF PROCEDURE IN THE COURTS OF ADMIRALTY OF THE UNITED STATES OF AMERICA. Together with an Appendix Containing Forms of Maritime Contracts, etc., and the Rules of Practice in Cases of Admiralty, Prescribed by the Supreme Court. By Edward F. Pugh, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson & Co. 1890.

A PRACTICAL TREATISE ON THE LAW OF REPLEVIN AS ADMINISTERED BY THE COURTS OF THE UNITED STATES. Arranged in Three Parts to facilitate ready reference. By J. E. Cobbey, B. S., L. L. B. Published and sold by J. E. Cobbey, Beatrice, Nebraska.

NEW YORK STATE BAR ASSOCIATION. Proceedings of the Thirteenth Annual Meeting held January 21, and 22, 1890. Also Reports for the year, 1889. Albany, N. Y. Weed, Parsons & Co. Printers. 1890.

THE LAW OF ARREST ON CRIMINAL CHARGES as it has been adjudged by the Federal and State Courts of the United States. By John S. Hawley, Editor. Vols. 1, 2, and 3, of American Criminal Reports.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATORS—Sale of Land.—An administrator having sold lands by order of the probate court, and received the price thereof a decree was entered ordering him to make a conveyance to the purchaser, which was never done. The purchaser, without taking possession, exchanged the lands for others, but gave no conveyance to his vendee. The latter went into possession; and plaintiff, claiming by proper conveyances from him, prayed the court to order the administrator to execute a conveyance to him: *Held*, that the exchange was void under the statute of frauds, and the probate court, having no equitable powers, could not make such order.—*Webb v. Ballard*, Ala., 7 South. Rep. 443.

2. ADMIRALTY—Collision.—Though, in a case of collision by night, the vessel failing to show the statutory lights must be held in fault, that does not relieve the other vessel, if under the same circumstances she would have been held liable before the introduction of the laws requiring lights.—*The City of Savannah*, U. S. D. C. (N. Y.), 41 Fed. Rep. 891.

3. ADVERSE POSSESSION—Right of Way.—A railroad company entered on lands, and, in the presence of the owner, and on his verbal promise to give a right of way, staked off a right of way of the usual with of 100 feet. The company constructed its tracks, and had actual, exclusive, and continuous possession of the 25 feet along the center of the right of way occupied by the tracks for the prescriptive period, claiming title to the whole strip, and exercising over it such usual acts of ownership as the nature of the property permitted: *Held*, in an action of ejectment by the grantee of the land, who purchased with knowledge of the existence of the road, that the company had title, under the statute of limitations, to the 100-foot strip.—*Hargis v. Kansas City, C. & S. Ry. Co.*, 13 S. W. Rep. 680.

4. APPEAL—Assignment of Errors.—In an action for the price of land, the defense was failure of consideration, in that there was a deficit in the amount of land purchased, which should be deducted. The court gave judgment against defendant, who moved for a new trial on the ground that the decision was against the law and the evidence: *Held*, that, on such assignment, refusal to grant a new trial could not be considered on appeal.—*Davis v. Montgomery*, Ind., 24 N. E. Rep. 367.

5. ATTORNEYS—Misconduct.—It being the practice of the Supreme Court of Pennsylvania not to hear appeals from *pro forma* decrees, it is an offense punishable by disbarment for an attorney, with the intention of misleading the court, in making up his paper book to add to the words "bill dismissed," as contained in the record, the words "in order that the supreme court might decide the case," where the case was decided on the merits.—*In re Van Horn*, Penn., 19 Atl. Rep. 853.

6. BANKS—Trust.—A person directed his bank to pay certain debts, which would mature during his absence, and give a check to cover the amount. The bank paid one creditor with a sight draft on its own correspondent, and failed before the draft was paid. A receiver was appointed, and plaintiff, holder of the draft, filed a bill to have the receiver declared a trustee of the assets for its benefit: *Held*, that a trust was not created by the mere revocable direction of the debtor, to which plaintiff was not a party.—*Louisville Banking Co., v. Paine*, Miss., 7 South. Rep. 462.

7. BILL OF EXCEPTIONS.—A bill of exceptions which does not contain a statement as to when it was presented to the judge to be signed, as required by Rev. St. Ind., 1888, § 629, does not become part of the record.—*Bierly v. Harrison*, Ind., 24 N. E. Rep. 361.

8. BOUNDARIES—Color of Title.—Where one, under a deed for land, built a boundary fence according to a recent survey, and occupied for more than 15 years, his possession was under color of title to the whole tract, including a strip which by a later survey was found to be outside the boundary.—*Carpenter v. Monks*, Mich., 45 N. W. Rep. 477.

9. BUILDING ASSOCIATION.—A building and loan association incorporated under the act of February 21, 1867, has power to compromise with a member and released him from further obligation to the corporation, whether the indebtness arose from a loan or on a subscription for stock. And, where the parties to the compromise have acted in good faith, the transaction will not be rescinded because the released member was paid a greater sum of money than he would receive upon a *pro rata* distribution of the assets of the concern.—*Wangerien v. Aspell*, Ohio, 24 N. E. Rep. 405.

10. CARRIERS—Measure of Damages.—Where cows in course of shipment had miscarriages owing to collision, the cattle being imported stock intended for breeding purposes, and the weight of testimony being that the value of a cow as a breeder is permanently depreciated by suffering a miscarriage: *Held*, that the measure of damage for the abortions, if found to have been occasioned by the collision, was the difference between the value of the animals at the point of destination and their value at the same place if delivered uninjured.—*Esbill v. N. Y. L. E. & W. R. Co.*, U. S. C. C. (Mo.), 41 Fed. Rep. 849.

11. CHATTEL MORTGAGE.—The temporary loan of a mortgaged horse is not such a breach of a condition of the mortgage, that the mortgagor shall not remove the horse "from the place where it now is" without the consent of the mortgagee, as will entitle the mortgagee to take possession.—*Jones v. Smith*, Ind., 24 N. E. Rep. 368.

12. CHATTEL MORTGAGES.—A mortgage of goods and chattels, executed by the members of a partnership—one of whom lives in the county where the property is situate, and the other in another county of this State—upon property jointly owned by them, which is not accompanied by an immediate delivery, and followed by an actual and continued possession, of the things mortgaged, is void as against an assignee for the benefit of creditors of such mortgagors, subsequently appointed, unless, pursuant to section 4150, Rev. St., the mortgage, or a true copy thereof, be properly filed in the township where each of such mortgagors resides.—*Westlake v. Westlake*, Ohio, 24 N. E. Rep. 412.

13. CHATTEL MORTGAGE—Possession — Evidence.—A mortgage of horses left in the mortgagor's livery stables after default went to the stables and "checked

off" the horses mortgaged without separating them from other horses in the stables, or putting up any notice of ownership. He left an agent in charge of them, with instructions not to allow them to be taken from the stables; but the mortgagor still fed and cared for them, and testified that he drove them, and used two of them in his business, until defendant levied an execution on them: *Held*, that there was not a sufficient change of possession to entitle the mortgagee to recover them, within the meaning of Gen. St. Colo. § 1523.—*Atchison v. Graham*, Colo., 23 Pac. Rep. 876.

14. CONSTITUTIONAL LAW.—Act Pa. April 5, 1870, which authorizes the borough of Wilkes Barre to buy a certain tract of land formerly used as a grave-yard, and directs that, before the borough should sell any part of such land it should convey a certain portion of it to the "Wyoming Historical and Geological Society, for the erection of a hall for" such society, is not unconstitutional, as taking private property for private use, and a deed thereunder is valid. — *City of Wilkes Barre v. Wyoming Historical & Geological Soc.*, Penn., 19 Atl. Rep. 809.

15. CONSTITUTIONAL LAW — Meat Inspection Law. — Acts Va. 1889-90, ch. 80, p. 63, requiring all fresh meat which shall have been slaughtered 100 miles or more from the place where it is offered for sale, to be inspected before it is offered, and providing for payment by the owner of one cent per pound for such inspection, is unnecessary and unreasonable, and, since it has the effect of excluding dressed meat slaughtered outside the State, is unconstitutional as usurping the the exclusive power to regulate interstate commerce given congress by Const. U. S. art. 1, § 8.—*In re Rebman*, U. S. C. C. (Va.), 41 Fed. Rep. 867.

16. CONSTITUTIONAL LAW — Taxation. — Where, upon each side of a proposed free turnpike road, unconnected therewith, and within less than two miles thereof, there runs unimproved State or county road, and the road commissioners fix the bounds of the turnpike road to the full extent of one mile on each side of the same section 4786 of the Revised Statutes, so far as it provides that, in taxing territory between the turnpike road and the State or county roads, extra taxes shall only be levied upon such lands and personal property as lie within one-half the distance of such roads, is not in conflict with section 2, of article 12 of the constitution.—*Carlisle v. Hetherington*, Ohio, 24 N. E. Rep. 488.

17. CONSTITUTIONAL LAW — Titles of Statutes. — The title of Act Mo. March 30, 1887, (Laws Mo. 1887, p. 272), entitled "An act fixing the number of directors in public school boards in certain cities, and providing for election of such directors, and for districting said cities therefor," is not within the prohibition of Const. Mo, art. 4, § 28, which declares that no bill shall contain more than one subject, which shall be clearly expressed in the title.—*State v. Miller*, Mo., 13 S. W. Rep. 677.

18. CONTRACTS—Performance.—The delivery of all the logs from a certain tract of land except a few which were so covered with brush and snow that they could not be found and gotten out by the use of reasonable care and diligence is such a substantial compliance with a contract to cut and deliver all the logs from the tract at a certain price per thousand feet as will warrant a recovery for the logs delivered. — *Pallman v. Smith*, Penn., 19 Atl. Rep. 891.

19. CONTRACT—Vendor and Vendee.—Under the facts held that the minds of the parties did not meet and the correspondence did not constitute a contract by defendants to buy.—*Sault St. M. Land & Imp. Co. v. Simons*, U. S. C. C. (Wis.), 41 Fed. Rep. 835.

20. CRIMINAL LAW—False Personation. — Under How. St. Mich. § 9252, making it a criminal offense for any person to falsely pretend to be a justice of the peace, sheriff, constable, or coroner, or falsely take upon himself to act or officiate in any office or place of authority, a conviction cannot be had on an information charging defendant with assuming to be a member of the metropolitan police force of Detroit, without alleging that he undertook to act as such.—*People v. Cronin*, Mich., 45 N. W. Rep. 481.

21. CRIMINAL LAW—Homicide.—On the question of a reasonable appearance of danger to justify homicide, the court properly charged that "it is the right of the defendant to have the facts considered by the jury as they reasonably appeared to him at the time they transpired, and if, as the facts reasonably appeared to the defendant, he would be justified under the law as given in this charge, he should be acquitted. It would make no difference that the facts were mistaken by the defendant, and that he was in no real danger if it be so."—*Valley v. State*, Tex., 13 S. W. Rep. 670.

22. CRIMINAL LAW—Trial.—Code Crim. Proc. Tex. art. 661, permitting the introduction of testimony at any time before the conclusion of the argument, if in the interest of justice makes it discretionary for the court to allow the prosecution on a murder trial, to examine a witness in rebuttal as to matters independent of the rebuttal after defendant has closed his testimony; and such discretion is not reviewable, except in case of manifest abuse.—*Hendricks v. State*, Tex., 13 S. W. Rep 672.

23. CRIMINAL PRACTICE — Attorney. — Under How. St. Mich. § 557, where an attorney was employed in a suit to replevy a horse, for one claiming a lien thereon, it was error to allow him to prosecute defendant for larceny for taking the horse from his client's possession on a claim of right under a chattel mortgage executed in the course of the transactions that gave rise to the replevin suit.—*People v. Hillhouse*, Mich., 45 N. W. Rep. 484.

24. COUNTIES—Taxation.—Under the constitution and laws of this State, a county cannot impose taxes except for county purposes; and the building of a bridge in a county within the corporate limits of a municipality, in which the county outside of those limits is in nowise interested, the same being for the sole benefit and advantage of the municipality, is not a county purpose.—*Skinner v. Henderson*, Fla., 7 South. Rep. 464.

25. COUNTY COMMISSIONERS—Powers.— The board of commissioners of a county being required by Rev. St. Ind. § 5748, to erect a court-house where the same has not been done, and to keep the county building in repair, and being authorized by section 5749 to provide the means to construct, complete, or repair the court-house or other public buildings, whenever it shall be necessary to do so, it is for them alone to determine whether an old court-house should be replaced by a new one.—*Kitchell v. Board of Commissioners*, Ind., 24 N. E. Rep. 366.

26. COUNTY TREASURERS — Settlement. — The county court, before which Rev. St. Mo. 1879, § 5378, makes it the duty of a county treasurer, or the personal representative of a deceased county treasurer, to settle his accounts, does not, in such examination, act in a judicial capacity, but merely as an auditor of public accounts, or as financial agent of the county.—*Cole County v. Dallmeyer*, Mo., 13 S. W. Rep. 687.

27. DECEIT—Election.—The mere bringing of a suit to rescind a contract is not such an election of remedies as to preclude plaintiff from amending the complaint so as to make it one for damages for false representations whereby the contract was induced.—*Nysewander v. Lowman*, Ind., 24 N. E. Rep. 355.

28. DEED—Boundaries.—Where the grantor in a deed conveying land to the United States is to fence the same, the placing of a wall upon a line diverging from that called for by the deed cannot be taken to designate the true line, in the absence of evidence of assent thereto by the United States.—*United States v. Murray*, U. S. D. C. (Me.), 41 Fed. Rep. 862.

29. DEED—Statute of Frauds.—In a suit for reconveyance of land, plaintiff is not prohibited by the statute of frauds from showing that, though the deed was absolute in form, it was without consideration, and was executed in reliance on defendant's verbal promise to reconvey to plaintiff after her marriage with one C. —*Catalani v. Catalani*, Ind., 24 N. E. Rep. 375.

30. DESCENT—Right of Wife.—The wife inherits from her husband, who has left no lawful ascendants or descendants, or lawful collateral relations, to the exclusion of his natural collaterals.—*Montegut v. Bacas*, La., 7 South. Rep. 449.

31. EMINENT DOMAIN — Damages. — In an action to assess damages for land taken and injured by a railroad company, it is proper to charge that, where they have been no public sales of adjoining land, the market value of the land in controversy "can be ascertained from the knowledge and judgment of men who are acquainted with the property, and who by their experience and judgment can give a fair, honest, and impartial opinion as to the real value of the property.—*Curtin v. Nittany Val. R. Co.*, Penn., 19 Atl. Rep. 740.

32. EVIDENCE—City Ordinace.—A book in which all the ordinances of a town are recorded, kept in its custody, is sufficient proof of the existence of an ordinance therein, in a prosecution for drunkenness.—*Boones v. Common Council*, Ala., 7 South. Rep. 437.

33. EVIDENCE—Expert.—An hypothetical question to an expert as to the number of persons who should be put in charge of a water train where there where four regular trains, each day, passing over the road is properly allowed, though it appears that only two of the trains would be met by the water train, as the opposite party can embody that fact, if material, in a question put on cross-examination.—*Gulf, C. & S. F. R'y. Co. v. Compton*, Tex., 13 S. W. Rep. 667.

34. EVIDENCE—Sale of Land.—Oral testimony, in the absence of charges of fraud, error, or violence, is inadmissible, between the parties to a sale of real estate, to show the simulation of the transaction. None but documentary proof is legitimate in such a case.—*Johnson v. Flanner*, La., 7 South. Rep. 455.

35. EXECUTION—SHERIFFS.—Under Rev. St. Ill. ch. 77, § 9, a sheriff may levy an execution on property which has been already seized, but not sold by a constable under a writ of attachment which was given to him after the sheriff had received the execution, since the lien of the execution in such case is prior to that of the attachment writ.—*Hanchett v. Ives*, Ill., 24 N. E. Rep. 396.

36. FEDERAL COURTS—Corporations.—24 St. U. S. 552, which provides that no civil suit shall be brought in the federal courts against any person "in any other district than that whereof he is an inhabitant," does not oust said courts of jurisdiction of a suit against a foreign corporation which has agreed, as a condition of the right to transact business in the State, to submit to be sued there, since the right given by the statute is a personal exemption, which may be waived.—*Consolidated Store-Service Co. v. Lamson Consolidated Store-Service Co.*, U. S. C. C. (Mass.), 41 Fed. Rep. 833.

37. FRAUDS—Statute of—Contract.—The owner of certain mares, by an oral agreement, sold a half interest therein to defendant, payment to be made on or before four years. It was further agreed that defendant should have possession and care of all the mares from the time of the agreement; that they should be kept for four years, for breeding purposes only, at the joint expense of the parties, and should not be worked or sold within that time except by consent. At the end of the four years, their interests were to be equal: *Held*, that the sale and delivery of the mares was not within the statute of frauds.—*Lowman v. Sheets*, Ind., 24 N. E. Rep. 351.

38. FRAUDULENT CONVEYANCES.—The fact that a debtor, in order to give his creditor security on his land, agrees that it may be purchased by him at sheriff's sale, does not, in the absence of any actual fraud, render the sale fraudulent as against another creditor who does not make known his claim until seven years after the sale, and after the agreed time of redemption had expired.—*Ball v. Campbell*, Penn., 19 Atl. Rep. 802.

39. GAMBLING CONTRACTS — Option. — A contract by which stock is sold at a certain price with the option to the purchaser to resell it at a future time for an increased price, which increase is only the amount of interest which, by the time for exercising the option, would accrue on the amount paid for the stock, is not a gambling contract within Rev. St. Ill., ch. 38, § 130.—*Richter v. Frank*, U. S. C. C. (Ill.), 41 Fed. Rep. 859.

40. HIGHWAYS.— Under Act Pa. Feb. 24, 1845, which provides that if viewer shall decide in favor of locating a public road, and it shall appear to them that any damage will be caused thereby, they shall assess the damage and make report thereof, the omission by viewers to assess damages is equivalent to finding that none had been sustained.—*In re Road in Kingston Tp.* Penn., 19 Atl. Rep. 750.

41. HUSBAND AND WIFE — Community Property. — There is nothing in the jurisprudence of this State which prevents the surviving spouse from disposing of his or her part of the community property subject to the debts and charges of the community.—*Webre v. Lorio*, La., 7 South. Rep. 460.

42. INNKEEPER—Negligence.—An innkeeper is liable for goods stolen in his house from a guest, unless stolen by the servant or companion of the guest, except where the negligence of the guest contributes to the loss.—*Shultz v. Wall*, Penn., 19 Atl. Rep. 742.

43. INSANITY—Inquisition.— The death of an alleged lunatic pending proceedings in lunacy terminates the proceedings, so that no inquisition can be thereafter taken or decree made.—*Appeal of Bartholomew.*—Penn., 19 Atl. Rep. 847.

44. INSANITY — Pleading. — Where a complaint for specific performance against the heirs of a decedent alleges that decedent sold complainant land in consideration of her promise to support him for life, and agreed to convey or devise it to her, an answer which alleges as a defense insanity of decedent at the time the contract was made, need not allege that it was a continuing disability.—*Sheets v. Bray*, Ind., 24 N. E. Rep. 357.

45. INSURANCE—Conditions.—An express provision in an insurance policy that the company shall not be liable thereon until the premium is actually paid, is waived by the unconditional delivery of the policy to the insured under an agreement that a credit shall be given for the premium.—*Farnum v. Phenix Ins. Co.*, Cal., 28 Pac. Rep. 869.

46. INSURANCE—Conditions.—Where an insured person, in good faith furnishes the insurance company, within the stipulated time, with proof of loss, which he intends as a compliance with the requirements of his policy, the neglect of the company to give him prompt notice of its objections to the proof furnished is sufficient evidence of waiver by estoppel.—*Dwelling House Ins. Co., v. Gould*, Penn., 19 Atl. Rep. 793.

47. INTOXICATING LIQUORS.—Under Act 126 of 1855, now become sections 1211-1216, inclusive, of the Revised Statutes, the power conferred upon the police juries and the authorites of towns and cities relating to the retailing of intoxicating liquors went no further than to authorize them to grant or withhold licenses for this purpose.—*State v. Harper*, La., 7 South. Rep. 446.

48. JUDGMENT—Pleading.— In a suit on a judgment the answer of the judgment debtor, which alleges that the judgment is void because no proper service of process was had on him in the action in which it was rendered, but does not aver that the record does not show due service, is demurrable. — *Indianapolis & St. L. Ry. Co., v. Harmless*, Ind., 24 N. E. Rep. 369.

49. JUDGMENT—Satisfaction.—Under Act Pa. March 14, 1876, which authorizes the court in which a judgment has been entered to order the same satisfied of record upon a showing by the judgment debtor that it has been paid, the only question to be determined is that of payment, and the rights of the parties to apply cross-demands, or set off judgments, cannot be inquired into upon such showing.—*Melan v. Smith*, Penn., 19 Atl. Rep. 738.

50. JUDGMENT—Vacating.—A domestic judgmen endered by a court of general urisdiction cannot be impeached by a party thereto, merely because the rec-

ord is silent as to the service of process on such party. —*McClanahan v. West*, Mo., 13 S. W. Rep. 674.

51. LANDLORD AND TENANT — Covenants. — Under a contract of lease which binds the lessee to keep the property in good repair, and to surrender it at the expiration of the lease in the same good order in which he received it at the beginning of the lease, he has the option to make the required or necessary repairs at the end of the lease, and his lessor has no cause of action for damages for his failure to make repairs until the expiration of the lease.—*Paynes v. James*, La., 7 South. Rep. 457.

52. LIMITATIONS—Absence from State.—Where a person, who is a non-resident of this State and absent from it when a cause of action accrues against him in favor of another in this State, afterwards, and during the period of the limitation, occasionally comes into this State, such presence in the State will not set the statute of limitations to running in his favor, although the plaintiff might, at such times, by the exercise of ordinary diligence, have commenced an action against him.—*Stanley v. Stanley*, Ohio, 24 N. E. Rep. 493.

53. LIMITATION OF ACTIONS.—In an action by a remainder-man, after the death of the life-tenant, to recover land conveyed by the life-tenant, in fee, the grantee cannot claim by prescription from the date of his deed, since the remainder-man's right of action did not accrue until the termination of the life-estate.—*Dupon v. Walden*, Geo., 11 S. E. Rep. 451.

54. MARRIAGE CONTRACT—Pleading—Evidence.—In an action for branch of contract to marry, the complaint is not dumurrable for failure to state that the parties were of a marriageable age; the presumption as to all contracts being that parties thereto are competent to contract. Evidence admissible in suit for breach of marriage contract.—*Jones v. Layman*, Ind., 24 N. E. Rep. 564.

55. MARRIED WOMAN.—In this State a married woman may own property and carry on trade or business on her sole and separate account, and there is no presumption of law that personal property in the possession of the wife while living with her husband belongs to the husband.—*Aberfelder v. Kavanaugh*, Neb., 45 N. W. Rep. 471.

56. MASTER AND SERVANT — Independent Contractor. —A construction company engaged in building a railroad made a subcontract for the construction of the road from a given point as far as the company's chief engineer might determine, the company to furnish a locomotive and train, with engineer, fireman, and brakeman, for the use of the subcontracts in such work: *Held*, that, while engaged in such work, the subcontractors were independent contractors, for whose negligence in the management of the train the company was not liable.— *Powell v. Virginia Const. Co.*, Tenn., 13 S. W. Rep. 691.

57. MECHANICS' LIENS. — Furnishing and putting up hearths in a house gratuitously, for the purpose of compensating for defective hearths previously put in, does not extend the time for filing a mechanic's lien.— *Harrison v. Woman's Homeopathic Hospital Ass'n.*, Penn., 19 Atl. Rep. 804.

58. MORTGAGE—Dower.—A widow whose dower is unassigned can mortgage the land to which her right attaches.—*Mutual Life Ins. Co. v. Shipman*, N. Y., 24 N. E. Rep. 179.

59. MORTGAGE—Execution.—The statutes of the State regulating the mode of signing, sealing, acknowledging, and recording mortgages are limited in their application to these particulars; the legal or equitable effect of the instrument and its contents are unaffected thereby; and the rights of the parties and of third persons subsequently dealing with the land are to be determined by the general rules of law and equity, applicable to the subject in analogous cases.—*New Vienna Bank v. Johnson*, Ohio, 24 N. E. Rep. 503.

60. MORTGAGE—Parol Evidence. — Where a written contract recites that one N sold goods to plaintiff in consideration of plaintiff's paying specified debts of N but does not provide for the disposition of the surplus, if any, the consideration is contractual, and parol evidence of negotiations between N and plaintiff before the contract was executed is not admissible to show that the transfer to plaintiff was a mortgage.—*Reisterer v. Carpenter*, Ind., 24 N. E. Rep. 371.

61. MORTGAGE—Right of Mortgagee. — Where a mortgagee's agent who has retained part of the mortgage loan to pay off a prior incumbrance neglects for some time to pay off such incumbrance, but finally does pay it in full, the mortgagor is not entitled to any rebate of interest on that account, he not having been injured by the delay.—*Sergeant v. Aberle*, Penn., 19 Atl. Rep. 739.

62. MUNICIPAL CORPORATION—Change of Street Grade. —Under Const. Ala. 1875, art. 14, § 7, a city is liable in damages to the value of a house and lot caused by a change in the grade of the adjacent sidewalk to the street level, though there was no actual taking of complainant's property. — *City Council v. Maddox*, Ala., 7 South. Rep. 433.

63. MUNICIPAL CORPORATION—Change—Grade.—Where a city, in making a street improvement, changes the established grape of the street, and damages are thereby sustained by the owener of an abutting lot, and the city, before commencing and after the completion of the improvement, fails to assess the damages thus sustained, such owner, in an actual against the city is entitled to interest on the amount of compensation awarded from and after the actual change of the established grade. — *City of Cincinnati v. Whetstone*, Ohio, 24 N. E. Rep. 409.

64. MUNICIPAL CORPORATIONS — Contracts. — Courts will not enforce against a municipal corporation a contract made for it, and in its name, by one of the officers who had not the authority to make such a contract.— *Burchfield v. City of New Orleans*, La., 7 South. Rep. 448.

65. MUNICIPAL CORPORATIONS — Opening Streets. — Under Rev. St. Mo. 1879, p. 1607, §§ 6-10, (St. Louis city charter,) providing that, in proceedings to open alleys, the city may dismiss at any time before final action by the circuit court on the report of the commissioners, an appeal by the property owners from an order denying a new trial is premature where final action has not been taken on the report, though at the time of the appeal the court was in a position to take final action. —*City of St. Louis v. Thomas*, Mo., 13 S. W. Rep. 685.

66. MUTUAL BENEFIT SOCIETY.—Concerning the powers, duties and liabilities of foreign mutual benefit societies under the insurance laws of the State of Ohio.— *State v. West. Union Mut. Life & Ass. Soc.*, Ohio, 24 N. E. Rep. 392.

67. NEGLIGENCE. — Contributory. — A workman in a mine crossed the bottom of a shaft, in which he knew that cages were being rapidly hoisted and lowered, without looking up the shaft, except for a short distance before he entered it, and without inquiring of those who stood by whether the cages were up or down, and was struck by a descending cage: *Held*, that he was guilty of contributory negligence. — *McDonald v. Rockhill Iron & Coal Co.*, Penn., 19 Atl. Rep. 797.

68. NEGLIGENCE—Dangerous Substances.—Consignors of gunpowder to be sold on commission are no tliable for damages resulting from an explosion of the power while stored by the consignees, the doctrine of *respondeat superior* having no application.—*Abrahams v. California Co.*, N. M., 23 Pac. Rep. 785.

69. NEGOTIABLE INSTRUMENTS.—The term "negotiable instrument" has a definite signification in the law merchant and the meaning of the term has not been changed by the Code. A negotiable instrument is one that is simple, certain, and unconditional. —*Hegeler, v. Comstock*, S. Dak., 45 N. W. Rep. 331.

70. NEGOTIABLE INSTRUMENT - Attorney's Fees. — A stipulation in a note to pay "all costs for collecting the above, not less than ten per cent.," includes an attorney's fee for bringing suit.—*Williams v. Flowers*, Ala., 7 South. Rep. 439.

71. NEGOTIABLE INSTRUMENT—Bill of Exchange.—An ordinary bill of exchange, negotiable as commercial paper, payable out of no particular fund, though drawn by a creditor upon his debtor, and delivered to his own creditor to be collected by him, and the proceeds applied to the claim of the latter creditor against the former, will not, while unaccepted, operate as an assignment, legal or equitable, of a debt due by account from the drawee of the bill to the drawee thereof.—*Baer v. English*, Ga., 11 S. E. Rep. 453.

72. NEGOTIABLE INSTRUMENT — Bona Fide Holder.—The fact that the payee of a negotiable note, at the time he negotiated it with plaintiff bank, deposited collaterals to secure it, does not import notice to plaintiff of failure of consideration where plaintiff's president and cashier testify that they knew nothing of the consideration, except that it was given for some kind of property, and that the payee told them that the note was good.—*Harmon v. Hagerty*, Tenn., 13 S. W. Rep. 690.

73. NEGOTIABLE INSTRUMENT—Indorsement. — An indorsement in blank vests the legal title to a note in one who takes it as owner, and the note itself, in the absence of rebutting proof, is *prima facie* evidence of ownership. — *Lakeside Land Co. v. Drowgoole*, Ala., 7 South. Rep. 444.

74. NEGOTIABLE INSTRUMENTS—Indorser.—In case an accommodation acceptor and indorser of a piece of commercial paper acquiesced it its retention by a bank discounting it, notwithstanding it has been in part paid, and the payment of the remainder extended, for which extension a new note is furnished to the bank, such acceptor having also indorsed said time note jointly with another, he is bound on both, and the obligation is not restricted to the latter. —*Woods v. Halsey*, La., 7 South. Rep. 451.

75. NUISANCE—Telegraph Wires.—Where employees of a telegraph company negligently allow its wires to fall on the wires of an electric light company, and to remain there hanging down, the telegraph company is liable for injuries sustained by a passenger on the street who accidentally comes in contact therewith.—*Henning v. Western Union Tel. Co.*, U. S. C. C. (S. Car.), 41 Fed. Rep. 864.

76. PARTIES—Practice.—An affidavit by defendant, in an action for commissions on the sale of land, that two other persons contended that they had made the sale in question, and claimed the commissions, does not require that such persons be made defendants under Rev. St. Ind. 1881, § 272.—*Fischer v. Holmes*, Ind., 24 N. E. Rep. 377.

77. PARTNERSHIP.— Plaintiff and defendants, as partners, leased a certain store-building for future possession. Prior to the commencement of the term, a dissolution of partnership being contemplated, defendants, without plaintiff's knowledge, secured a cancellation of the lease, and leased again, in their own name. Afterwards the partnership was dissolved; plaintiff buying out the interest of defendant in the partnership property and business: *Held*, that defendants held their lease of the building in trust for plaintiff.—*Sneed v. Deal*, Ark., 13 S. W. Rep. 703.

78. PARTNERSHIP—Accounting.—Where a firm, consisting of two partners, rent a furnished hotel from the father of one of the partners and during the lease the father gives his son various sums of money, which the latter expends in repairing the building and renewing the furnitue, such money cannot, on an accounting between the partners, be considered as a loan to the firm, in the absence of any claim made therefor against the firm by the father.—*Appeal of Moore*, Penn., 19 Atl. Rep. 753.

79. PARTNERSHIP—Limited.— Under Act Pa. May 1, 1876, (P. L. 89), which allows contributions to the capital of a limited partnership to be made "in real or personal estate, mines, or other property, at a valuation to be approved by all the members," such contribution may be made by the transfer of patent-rights.—*Rehfuss v. Moore*, Penn., 19 Atl. Rep. 756.

80. PRINCIPAL AND AGENT.—An agent, with power to sell and receive payment, cannot bind his principal by accepting, in lieu of payment for goods sold, a cancellation of his own debt to the purchaser, where the latter knows, or by the exercise of reasonable diligence could know, of the agency.—*Smith v. James*, Ark., 13 S. W. Rep. 701.

81. PRINCIPAL AND SURETY—Contractor.—The sureties on the bond of a contractor for the erection of a building are bound only in the manner and to the extent provided in the obligation.—*Brennan v. Clark*, Neb., 45 N. W. Rep. 472.

82. RAILROAD COMPANIES.—Where in an action against a railroad company for personal injuries, the complaint alleges that plaintiff was in the employ of the receiver of the road, and the answer sets up the discharge of the receiver and redelivery of the property to defendant, and it is admitted that during the receivership all earnings, after paying operating expenses, were applied to improvements on the road, to an amount greater than that sought to be recovered by plaintiff, the pleadings and proof properly present the question whether defendant is liable if the accident occurred under such circumstances as would entitle plaintiff to payment out of the earnings of the road had he recovered judgment pending the receivership.—*Texas, etc. Ry, Co. v. Johnson*, Tex., 13 S. W. Rep. 485.

83. RAILROAD COMPANIES— Amendment of Charter.—A railroad corporation having power by its charter, granted in 1888, to locate and construct its road where it may think proper, may, by amendment to its charter made after the company has located, but before it has constructed, its road, be confined to a particular route, on certain prescribed conditions as to a portion of the line through a given county. This results from the reserved power of the State, declared in §§ 1651, 1682, Code, to withdraw the franchises, or change, modify, or destroy the corporation, at the will of its creator.—*Macon, etc. R. Co. v. Stamps*, Ga., 11 S. E. Rep. 442.

84. RAILROAD COMPANY—Crossings.—The act of March 31, 1887, requiring railroad corporations to construct and keep in repair suitable crossings where railroads cross public highways, is constitutional. — *State v. Chicago, etc. R. Co.*, Neb., 45 N. W. Rep. 469.

85. RAILROAD COMPANY—Defective Bridge. — Where a bridge maintained by a railroad company as an approach to a crossing is reasonable, safe and convenient for the use of the traveling public, the company is not responsible for an injury sustained by the stepping of plaintiff's mule through a hole which is near one end of the bridge and out of the usual route of travel.—*Patterson v. North & South Ala. R. Co.*, Ala., 7 South. Rep. 437.

86. RAILROAD COMPANY— Indebtedness. —The act of April 16, 1870, entitled "An act to enable railroad companies to redeem their bonded debts," authorizes the issue of certificates of preferred stock, and does not authorize the issue of certificates of indebtedness. The holders of certificates issued under and by virtue of the provisions of the above act are stockholders in, and not creditors of, such corporation; and, under § 2746, Rev. St., are not required to list their shares for taxation in this State.—*Miller v. Ratterman, County Treasurer*, Ohio, 24 N. E. Rep. 496.

87. RAILROAD COMPANIES— Injuries to Stock.—Mansf. Dig. Ark. § 5478, requiring engineers of locomotive engines to ring the bell or blow the whistle before reaching public crossings, and making the railroad company "liable for all damages which shall be sustained by any person by reason of such neglect," includes injuries to cattle.—*St. Louis, etc. Ry. Co. v. Hendricks*, Ark., 13 S. W. Rep. 699.

88. RAILROAD COMPANY — Negligence. — Under Code Tenn. § 1167, which declares that in every case a nonobservance by a railroad company of certain precautions to prevent accidents the company shall be liable for the damages caused thereby, the fact that the injured person was guilty of contributory negligence, though admissible in mitigation of damages, is no bar

to the action.—*Chesapeake, etc. Ry. Co. v. Foster*, Tenn., 13 S. W. Rep. 694.

89. RAILROAD COMPANY—Negligence.—After waiting a reasonable time for cars blocking the highway to be removed, a pedestrian may turn aside to avoid the obstruction, and pass over the company's inclosed grounds. In so doing, he will be no trespasser.—*Smith v. Savannah, etc. Ry. Co.*, Ga., 11 S. E. Rep. 455.

90. REMOVAL OF CAUSES.—*Held*, under the facts that there was in the suit a separable controversy wholly between citizens of different States, and that the cause was removable under the third clause of § 2 of the removal act of March 3, 1887.—*Rich v. Gross*, Neb., 45 N. W. Rep. 468.

91. REMOVAL OF CAUSES.—A petition for the removal of a cause from a State to a federal court, under Removal Act Cong. 1887, alleged that the controversy was wholly between petitioner and plaintiff, who were citizens of different States; that co-defendant was joined solely to defeat the right of removal, and to defraud petitioner of its rights; that plaintiff formerly sued petitioner and co-defendant on the same cause of action, which action he dismissed as to co-defendant, thereby admitting that he had no cause of action against co-defendant, whereupon petitioner procured from the federal court an order of removal; and that plaintiff then dismissed that action, and brought the present one: *Held*, that no cause of removal was shown.—*Chesapeake, etc. Ry. Co. v. Hendricks*, Tenn., 13 S. W. Rep. 696.

92. RECEIVER'S SALE—Modification. — Where a court orders a receiver's sale to be confirmed on condition that the bid is increased a certain amount, the order becomes final on the acceptance of the terms by the purchaser, and the court has no power, at a subsequent term, to modify it.—*State Nat. Bank v. Neel*, Ark., 13 S. W. Rep. 700.

93. SALE — Pleading. — In an action for the price of goods sold, pleas alleging breach of warranty, and fraud in the procurement of the contract, and praying that the damages thereby sustained by defendants may be deducted from any amount found due plaintiff, are sufficient, without offering to rescind the contract and return property.—*Hillenbrand v. Stockman*, Ind., 24 N. E. Rep. 370.

94. STOCK—Pledge.— A regular transfer of shares of stock will remain undisturbed, unless satisfactory evidence is adduced showing that it was conditional, designed to serve as collateral or pledge to secure a payment, or was simulated, and not intended to transfer the ownership.—*Small v. Saloy*, La., 7 South. Rep. 450.

95. TAXATION—Street Improvements.— The provision of Const. Mo. 1875, art. 2, § 21, that private property cannot be taken or damaged for public use until compensation has been actually paid, applies only to the exercise of eminent domain, and it is no defense to special tax-bills for street improvements that the property was damaged by the improvement and no compensation has been made therefor. — *Keith v. Bingham*, Mo., 13 S. W. Rep. 685.

96. TOWN ORDINANCES.— The power is conferred upon the council of the town of Prineville, by its charter (Sess. Acts 1880, p. 116), to prevent and restrain drunkenness. Under this power the council may prohibit the furnishing or giving intoxicating liquors to an habitual drunkard, or one who is in the habit of becoming intoxicated. — *Woods v. Town of Prineville*, Oreg., 28 Pac. Rep. 880.

97. TRIAL—Misconduct of Jury.—Proof of a separation of the members of the jury, during the time of their deliberations, some of them sleeping in a room, and some in an adjoining hall; some remaining in the room, while others walked out on a gallery,—is insufficient to vitiate their verdict.—*State v. Richmond*, La., 7 South. Rep. 459.

98. TRUSTEE.—Where a trustee under a will makes a promise that is in terms a personal one, and that is beyond his powers as executor and trustee, the fact that the consideration for such promise benefited the trust estate does not relieve him from personal liability. — *Fehlinger v. Wood*, Penn., 19 Atl. Rep. 746.

99. VENDOR AND VENDEE — Specific Performance.— Where a purchaser of lands who had agreed to erect thereon one residence within four months, and another within a year, was notified within the four months, and while building the first house, to surrender possession to the vendor, who shortly after sued in ejectment, the failure to build the second house within the year was not the laches of the purchaser, and did not estop him from obtaining equitable relief.— *Powell v. Higley*, Ala., 7 South. Rep 440.

100. WATERS — Surface Water. — The owner of land upon which surface water is thrown by the natural elevation of the ground cannot, by constructing ditches and drains, cause it to flow upon the lower land of his neighbor.—*Weddell v. Hapner*, Ind., 24 N. E. Rep. 368.

101. WILLS—Construction.—A will provided "that my whole estate be kept together and enjoyed by my beloved wife, S, and my children," five in number, naming them (one of whom afterwards died unmarried), and appointed the wife sole executrix, "with all the privileges and rights of buying and selling, and conveying my property, that I would have if living:" *Held*, that the widow and children took equal shares, their rights accrued simultaneously.—*Dryer v. Crawford*, Ala., 7 South. Rep. 445.

102. WILLS—Execution.—Under the statute of Oregon, every will, in order to be effective, is required to be in writing, signed by the testator or by some other person under his direction, in his presence, and attested by two or more competent witnesses subscribing their names to the will in the presence of the testator. — *Luper v. Werts*, Oreg., 23 Pac. Rep. 850.

103. WILL—Legacies.—A testator directed that his real and personal property be sold and converted into money, and that out of the fund thus arising certain legacies should be paid, and that the remainder should go to residuary legatees: *Held*, that the legacies were charged on the real estate.— *Appeal of Chilcott*, Penn., 19 Atl. Rep. 850.

104. WILLS—Nuncupative.—The omission to make express mention in a nuncupative will by public act, or in equivalent terms, that it was written by the notary, is fatal, and invalidates the instrument.— *Miller v. Shumaker*, La., 7 South. Rep. 456.

105. WILLS—Widowhood.— Testator devised property to his widow "and heirs, for her to dispose of as she sees best; that is to say, during the time she lives a widow or in my name. Then said land is to be equally divided amongst the heirs" of one D and M his wife "or the proceeds of the same, as the case may be:" *Held*, that the widow took an estate during widowhood. —*Levengood v. Hoople*, Ind., 24 N. E. Rep. 373.

106. WILLS—Attestation.—A will was prepared at testator's dictation, and at his request three persons were called to witness its execution. The paper was then handed to him, with the remark, "Here is your will," whereat he put on his spectacles and either read or glanced over it, and then signed it. He then asked the witnesses if they could identify his signature, and, after examination, they said they could and thereupon subscribed it within a few feet of him and where he could see them by turning his head upon the pillow, which he was easily able to do: *Held*, a sufficient attestation.—*Walker v. Walker*, Miss., 7 South. Rep. 491.

107. WILL—Undue Influence.—*Held*, that the influence of defendant, resulting from the partiality of testator for him, did not constitute undue influence; and that, to defeat the conveyance, imposition, fraud, importunity, duress, or something of that nature must appear.—*Mackall v. Mackall*, U. S. S. C., 10 S. C. Rep. 705.